Supreme Court, U.S.
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NO. ____ OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

In Re: JAMES CONSTANT,

Appeal Court Nos
92-55465,92-56220,
92-56475

Debtor,

JAMES CONSTANT

Petitioner,

v.

ADVANCED MICRO-DEVICES, INC.; KRISTIN M. CANO; KANE, DALSIMER, SULLIVAN, KURUCZ, LEVY, EISELE & RICHARD; AT&T PARADYNE; JONATHAN R. ELLOWITZ; ANTHONY DE ALCUAZ; SKJERVEN, MORRILL, MACPHERSON, FRANKLIN & FRIEL; MORRISON & FOERSTER; LIMBACH & SUTTON; FUJITSU, LTD; FUJITSU MICROELECTRONICS; PAUL MALINGAGIO; SHEPPARD, MULLIN, RICHTER & HAMPTON; BAKER MILLS & GLAST; ACKER, UNDERWOOD & SMITH; FPS, INC; FULLBRIGHT & JAWORSKI; AMERICAN TELEPHONE & TELEGRAPH; SPENSLEY, HORN, JUBAS & LUBITZ; HITACHI AMERICA, INC.; PRETTY, SCHROEDER, BRUEGGEMAN & CLARK; HOPGOODE, CALIMAFDE, KALIL, BLAUSTEIN & JUDLOWE; ANALOG DEVICES, INC.;

94-10003

60 pp

NEC ELECTRONICS, INC.; BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN; BROWN & BAIN; MARCEL HOFF; INTEL CORP.; ROMNEY, GOLANT, MARTEN & ASHEN; AMERICAN MICROSYSTEMS, INC.; GOULD, INC.; TEXAS INSTRUMENTS, INC.; GROSSMAN, GRAVEN, PERRY & BLOCK; DIGITAL SWITCH, INC.; GRANGER ASSOCIATES, INC.; MUNGER, TOLLES & OLSON; ARNOLD; ROCKWELL INTERNATIONAL, INC.; TRW, INC.; WHITE & DURKEE; DAVID L. RAY, Trustee; SALTZBURG, RAY & BERGMAN;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James Constant
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Pro-per Petitioner

QUESTIONS PRESENTED

Should this Court resolve direct conflicts between the court of appeal's decisions and decisions of this Court and other Circuit Courts on the following matters:

1. Whether affirmative defenses of patent invalidity and of res judicata are claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b).

2. Whether affirmative defenses of patent invalidity and of res judicata are claims for purposes of jurisdiction under 28 USC 1338,1331,1343,1334 and 28 USC 157(b)(2) (B) and (C).

3. Whether affirmative defenses of patent invalidity and res judicata offend due process when they deprive petitioner's right to be heard on claims of his complaints.

4. Whether the appeal court can make its decision without an inquiry into the question of subject matter jurisdiction raised by petitioner in the action.

5. Whether judgements in earlier cases may be subsequently attacked for lack of subject matter jurisdiction when it appears that the earlier judgements were manifest abuses of authority or have seriously impaired the public interest by deciding complaints on the basis of affirmative defenses of patent invalidity and res judicata or have infringed due process of a party's right to be heard on claims of a complaint.

6. Whether sanctions under Rule 11 of the Federal Rules of Civil Procedure can be considered on issues of defense in papers not signed by petitioner.

7. Whether a creditor's judgement is a lien against United States Patents under 28 USC 1962.

8. Whether courts have jurisdiction of subject matter to order the assignment of United States Patents by operation of California State laws.

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

In Re: JAMES CONSTANT,

Appeal Court Nos
92-55465,92-56220,
92-56475

Debtor

JAMES CONSTANT,

Petitioner

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ADVANCED MICRO-DEVICES, INC.; KRISTIN M. CANO; KANE, DALSIMER, SULLIVAN, KURUCZ, LEVY, EISELE & RICHARD; AT&T PARADYNE; JONATHAN R. ELLOWITZ; ANTHONY DE ALCUAZ; SKJERVEN, MORRILL, MACPHERSON, FRANKLIN & FRIEL; MORRISON & FOERSTER; LIMBACH & SUTTON; FUJITSU, LTD; FUJITSU MICROELECTRONICS; PAUL MALINGAGIO; SHEPPARD, MULLIN, RICHTER & HAMPTON; BAKER MILLS & GLAST; ACKER, UNDERWOOD & SMITH; FPS, INC; FULLBRIGHT & JAWORSKI; AMERICAN TELEPHONE & TELEGRAPH; SPENSLEY, HORN, JUBAS & LUBITZ; HITACHI AMERICA, INC.; PRETTY, SCHROEDER, BRUEGGEMAN & CLARK; HOPGOODE, CALIMAFDE, KALIL, BLAUSTEIN & JUDLOWE; ANALOG DEVICES, INC.; NEC

ELECTRONICS, INC.; BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN; BROWN & BAIN; MARCEL HOFF; INTEL CORP.; ROMNEY, GOLANT, MARTEN & ASHEN; AMERICAN MICROSYSTEMS, INC.; GOULD, INC.; TEXAS INSTRUMENTS, INC.; GROSSMAN, GRAVEN, PERRY & BLOCK; DIGITAL SWITCH, INC.; GRANGER ASSOCIATES, INC.; MUNGER, TOLLES & OLSON; ARNOLD; ROCKWELL INTERNATIONAL, INC.; TRW, INC.; WHITE & DURKEE; DAVID L. RAY, Trustee; SALTZBURG, RAY & BERGMAN;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, James Constant, respectfully prays that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on December 3, 1993 affirming the district court's dismissal of the complaint on grounds of res judicata without considering important exceptions to that rule which allow judgements to be collaterally attacked when the public interest is seriously impaired.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in Appendix A to this Petition. The order dismissing complaint of the District Court for the Central District of California appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeal's Opinion in this matter was filed on 3 December, 1993. A timely petition for Rehearing and Suggestion that Case is Heard In Banc was filed on 16 December, 1993. The Court of Appeal's denial of the Petition for Rehearing was issued on 10 January, 1994 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 54(b) involved in the earlier and instant cases is set forth in Appendix D.

Jurisdictional Statute 28 USC 1338 involved in earlier Cases 1,3,4; Jurisdictional Statutes 28 USC 1331 and 1343 involved in earlier Case 2; and Jurisdictional Statutes 28 USC 1334 and 28 USC 157(b)(2)(B) and (C) involved in the instant case are set forth in Appendix E.

Amendment V to United States Constitution involved in earlier Case 2 and in the instant case is set forth in Appendix F.

Federal Rule of Civil Procedure 11 involved in earlier Case 2 and in the instant case, and Statutes 28 USC 1962 and 35 USC 261 involved in the instant case are set forth in Appendix G.

STATEMENT OF THE CASE

In earlier (pre-bankruptcy) Cases 1-4, petitioner's complaints were dismissed on issues of affirmative defenses[1]. Petitioner filed for bankruptcy and brought the instant case in the bankruptcy court entitled Objections To Creditor's Claims Based On Void Judgements Obtained Through Fraud. The bankruptcy court had jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(2)(B) and (C). Objections were made under Bankruptcy Rule 3007. The reference was withdrawn to the district court.

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[1] Earlier Case 1 made claims for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts found 2 of petitioner's patents invalid under Rule 56. *Constant v. Advanced Micro Devices, Inc.* (CAFC 88) 848 F.2d 1560, 7 USPQ2d 1057 *cert. den.* 488 U.S. 892 (1988).

Earlier Case 2 made claims that the judgement in earlier Case 1 was procured by fraud, and claims for violations of constitutional, and civil rights. The district court had jurisdiction pursuant to 28 USC 1331 and 1343. The courts dismissed the case on issues of defense under Rule 56 (collateral estoppel) and Rule 12(b) (absolute immunity). Cases CV 87 6766R/7046R/6592R/7315R Central District, California 1987) *aff'd* CAFC 88-1195 to 88-1198 CAFC 8/25/88 unpublished memorandum decision.

Earlier Case 3 made claims for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts dismissed the case under Rule 41(b). *Constant v. Advanced Micro Devices, Inc.* Case CV 88 0784 SVW Central District California CAFC 89-1122 *aff'd* 4/11/89. 873 F.2d 1451. S Ct 88-1933 *cert. den.* 10/2/ 89. ___U.S___, 110 S.Ct. 62.

Creditor's earlier Case 4 made claims for invalidity of petitioner's patents. Petitioner counter-claimed for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts found petitioner's patent invalid under Rule 56. *Advanced Micro-Devices, Inc. v. Constant* C 88 20101 RPA Northern District, California 1988 *aff'd* CAFC 89-1432.

The complaint makes four counter-claims objecting to creditor's claims against the estate[2]:

1. In earlier Cases 1-4 the courts lacked subject matter jurisdiction.

2. In earlier Case 3 the courts lacked personal jurisdiction over creditors, and in earlier Case 4 the courts lacked personal jurisdiction over petitioner.

3. In earlier Cases 1-4 judgements against petitioner were obtained in violation of due process.

4. In earlier Cases 1-4 judgements against petitioner were obtained by fraud.

In its Memorandum, under Dismissal of the Complaint, in 92-55465 the Appeals Court held that petitioner's instant action was barred by res judicata[3]. In No. 92-56220, the Appeals Court held that the district court did not abuse its discretion by imposing Rule 11 sanctions and awarding attorney's fees. In

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[2] A claim objection may raise issues under federal or state law or issues running to the allowability of creditor's claims. When joined with a counterclaim it is filed as an adversary proceeding pursuant to Bankruptcy Rule 7001 which provides for equitable relief including relief provided by Bankruptcy Rule 9024 [Relief from Judgement or Order]. See *Collier On Bankruptcy* 15th ed. Vol. 8 Chapters 3007,7001,9024. Whether or not a claim is to be allowed is a judicial determination. See *Heiser v. Woodruff* 327 US 726 (1946).

[3] Because of the relative importance of issues and space limitations, other issues decided by the appeals court (Withdrawal of Reference, Recusal Motion, and Prefiling Order) are not addressed here.

No. 92-56474, the Appeals Court affirmed the district court's order assigning petitioner's patents and copyrights to the U. S. Marshall, under California laws, to satisfy the court's judgement.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reasons that the opinions below in the earlier and instant cases conflict with previous decisions of this Court and with the decisions of other Circuits.

The following points of facts were overlooked by the appeals court:

1. Claims in the instant complaint are not identical to claims in the earlier cases. *21 Fed. Proc. LEd* 51:201 (citations for rule of identical claims); *Scott v. Kuhlman* (CA9 1984) 746 F2d 1379.

2. No claims in earlier Cases 1-4 or in the instant case were actually adjudicated on merits[4]. *21 Fed. Proc. LEd* 51:193,201 (citations for rule of adjudicating actual claims); *Golden v. Pacific Maritime Association* (CA9 1986) 786 F2d 1425, 40 BNA FEP Cas 968. Earlier Cases 1,3,4 were deter-

[4] In earlier Case 3 petitioner moved to dismiss the complaint for lack of personal jurisdiction. The motion was not decided by the district court. See complaint par. 73. In earlier Case 4 petitioner filed papers objecting to venue. Objections were not decided by the district court. See complaint par. 84.

mined on affirmative defenses of patent invalidity. Earlier Case 2 was determined on affirmative defenses of collateral estoppel (as to non-judicial parties) and judicial immunity (as to judicial parties)[5]. The instant case was decided on the affirmative defense of res judicata.

3. No hearings on claims were held in earlier and instant cases. *Allen v. McCurry* (1980) 449 US 90, 66 LEd2d 308, 101 SCt 411 (citations for rule of due process).

The following points of law were overlooked by the appeals court:

1. Whether affirmative defenses of patent invalidity in earlier Cases 1,3,4, of collateral estoppel and judicial immunity in earlier Case 2, and of res judicata in the instant case are claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b).

2. Whether affirmative defenses of patent invalidity in earlier Cases 1,3,4, of collateral estoppel and judicial immunity in earlier Case 2, and of res judicata in the instant case are claims for purposes of jurisdiction under 28 USC 1338 in earlier patent Cases 1,3,4, under 28 USC 1331,1343 in earlier non-patent Case 2, and under 28 USC 1334 and 28 USC 157(b)(2)(B) and (C) in the instant case.

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[5] Fraud, constitutional, and civil rights claims in earlier Case 2 were different from patent claims in earlier Case 1. Contrary to the appeal court statement (p. 4 App. A), Judge Real, who presided over earlier Case 2, did not preside over earlier patent cases 1,3,4.

3. Whether affirmative defenses in the earlier and instant cases, which deprive petitioner's right to be heard on claims of his complaints, offend due process.

4. Whether petitioner's challenges to the court of appeal's jurisdiction in the instant case and the public interest of holding courts to their prescribed jurisdiction render judgements voidable in the instant and earlier cases.

5. Whether petitioner in earlier Cases 2,3 and in the instant case can be sanctioned for issues of defense in papers not signed and filed by the petitioner.

6. Whether petitioner's United States Patents are subject to assignment by operation of California state law.

A. Judgements In Earlier Cases And In Instant Case Are Not Final

1. The entry of an order under Federal Rule of Civil Procedure 58 is subject to the provisions of Federal Rule of Civil Procedure 54(b) governing multiple claims and parties. A procedural defense not necessary for resolving claims is not a claim for purposes of Rule 54(b).

2. Judgements must be determined on the merits of a cause of action. *Sears Roebuck & Co. v. McKay* (1956) 351 US 427, 100 LEd 1297, 76 SCt 895, 1956 CCH Trade Cases 68370; *Curtis Wright Corp. v. General Electric Co.* (1980) 446 US 1, 64 LEd2d 1, 100 SCt 1460, 29 FR Serv2d 221.

3. An affirmative defense does not present claims for relief under Rule 54(b). *Flynn & Emrich Co. v. Greenwood* (CA4 1957) 242 F2d 737, *cert. den.*, 353 US 976, 1 LEd2d 1137, 77 SCt 1060; *Smith v. Benedict* (CA7 1960) 279 F2d 211, 3 FR Serv2d 851; *First Federal Savings & Loan Asso. v. Peterson* (ND Fla 1981) 521 FSupp 416.

4. It is necessary to adjudicate the claims for four reasons, first, to fulfill the requirements for adjudicating claims under Rule 54(b), second, to fulfill the requirements for adjudicating claims under 28 USC 1338,1331,1343,1334 and 28 USC 157(b)(2)(B) and (C), third, to protect the right to be heard on claims of a complaint and, fourth, to determine whether sanctions are warranted under Federal Rule of Civil Procedure 11 for claims in papers actually signed and filed by petitioner.

B. Judgements In Earlier Cases And In The Instant Case Based On Affirmative Defenses Lack Jurisdiction

1. In *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811, in a case involving the same Federal Circuit judges who affirmed earlier Cases 1-4, this Court held that a patent law defense of patent validity is not a claim (cause of action) for purposes of jurisdiction under 28 USC 1338. More generally, this Court held that a defense or procedure is not a claim under 28 USC 1331 and 28 USC 1343. Clearly, therefore, the earlier non- bankruptcy Cases 1-4 were decided on issues of defenses without jurisdiction of the subject matter.

2. In the instant case, the district court's jurisdiction is under 28 USC 1334, 28 USC 157(b)(2)(B) [allowance or dissallowance of claims] and (C) [counter- claims against persons filing claims against the estate][6]. There is nothing in the record of the instant case that shows that creditor's claims were judicially determined as allowed or dissallowed or that petitioner's counterclaims against creditor's claims were adjudicated on the actual merits. Therefore, assuming arguendo that petitioner's counterclaims collaterally attacking earlier judgements are without merit, the courts failed their jurisdictional duty to judicially determine whether creditor's claims are allowable. *Heiser, supra.*

3. Earlier Cases 1-4 and the instant case were decided on issues of defense not claims (causes of action) of the complaint. However, a district court's jurisdiction is over claims not issues of defense. A suit arises under the law that creates the cause of action not from defenses to claims. Jurisdiction is not determined by examining the initial complaint but by ascertaining whether a claim of the complaint was litigated and determined in the case. *Christianson, supra.*

4. In the patent law, invalidity and unenforceability, as well as noninfringement, are merely affirmative defenses. It is well established that federal subject matter jurisdiction may not rest on defenses but must instead rest on affirmative claims of federal rights. *Louisville & Nashville RR Co. v. Mottley* (1908)

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[6] In the complaint of the instant case, paragraphs 4-20 raise issues of the allowance of creditor's claims under 28 USC 157 (b)(2)(B) while the remaining counts raise counterclaims under 28 USC 157(b)(2)(C).

211 US 149, 29 SCt 42, 53 LEd 126; *Thiokol Chemical Corp. v. Burlington Industries, Inc.* (CA3 1971) 448 F2d 1328, 1330-31 *cert. den.* 404 US 1019, 92 SCt 684, 30 LEd2d 668 (1972). When questions of patent validity and infringement are raised in the same proceeding the trial court should enter judgement on both. *Simmons Fastener Corp. v. Illinois Tool Works, Inc.* (CAFC 1984) 739 F2d 1573; 222 USPQ 744 (citing *Lindeman*; *Stratoflex*; *Medtronic*).

> "Though an invalid claim cannot give rise to liability for infringement, whether it is infringed is an entirely separate question capable of determination without regard to its validity. Because both validity and infringement involve construction of a claim, and because the construction must be the same in determining both, it is desirable to decide both questions at the same time". *Id.*

5. In *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811 this Court held:

a. "Statute 28 USC 1338(a) grants the district court's original jurisdiction of any civil action 'arising under' any federal statute relating to patents" *Id* 2168.

b. "Jurisdiction cannot be based on Federal Rule of Civil Procedure 15(b) by deeming the complaint amended". *Id* 2170[7].

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[7] In the earlier cases, in effect jurisdiction was based on Rules 56 (Cases 1,2,4), 12(b) (Case 2), and 41(b) (Case 3).

c. "The motion for summary judgement raised a patent law issue that Colt's patents were invalid under 35 USC 112. The district court, relying on the Section 112 theory, invalidated nine of Colt's patents. The Federal Circuit reversed". *Id* 2172.

d. "A patent law issue (validity of patents) is not necessary to overall success of a claim". *Id* 2174.

e. "The summary judgement papers focused on the patent law issues of validity, defenses and counterclaims. The patent law focus of the summary judgement papers did not assert a new patent law claim". *Id* 2177.

f. "A court may not in any case extend its jurisdiction where none exists". *Id* 2178.

g. In their concurring opinion, *Id* 2179-82, Justices Stevens and Blackmun held that "the answer to the question whether a claim arises under the patent laws may depend on the time when the question is asked. If the question is asked at the end of the trial, the answer may be different than if it had been asked at the outset to decide whether a federal district court has jurisdiction to try the case". *Id* 2179.

h. "The question whether a claim arises under the patent laws is similar to the question whether a claim arises under federal law. Section 1338 jurisdiction, like Section 1331 jurisdiction, is over claims not issues. A suit arises under the law that creates the cause of action". *Id* 2180 and Note 1 citations.

i. "Congress did not create an express cause of action to enforce 35 USC 112 of the patent laws, and there is no implied cause of action under Section 112"[8]. *Id* 2180.

j. "Since it seems plain that no implied cause of action exists under Section 112, an attempt at gaining federal court jurisdiction under Section 112 would be rejected under the 'artful pleading' doctrine" *Id* 2180 and Note 2.

k. "To sanction suits for declaratory relief as within the jurisdiction of the district courts because artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective function of the federal judicial system and distort the limited procedural purposes of the Declaratory Judgement Act[9]. Artful pleading cannot be invoked on the basis of facts not challenged in the complaint". *Id* 2180 Note 2 citations.

l. "The district court's opinion might be read as suggesting that whether patent claims are properly before the Federal Circuit on appeal should be determined by examining only the initial complaint and not by ascertaining whether a patent claim was litigated in the case. Such an approach would assume that whether a case 'arises under' the patent laws turns

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[8] In earlier Cases 1,3,4, in effect the courts created causes of action under 35 USC 282 providing for the affirmative defenses of patent invalidity.

[9] This particular citation by the Court applies to earlier Case 4 in which a creditor's complaint for Declaratory Judgement succeeded in invalidating petitioner's patent solely on issues of defense.

on the same considerations whether one is determining the Federal Circuit's appellate jurisdiction or a district court's original jurisdiction. But although 28 USC 1338(a) provides the basis for both types of jurisdictional assessment, Congress could not have intended the same analysis in both instances". *Id* 2181.

m. "The claim that was actually litigated (patent invalidity) did not arise under the Patent Laws". *Id* 2181.

6. Affirmative defenses are non- justiciable for the following reasons:

a. Federal courts must consider petitioner's claims in his complaints before they can consider issues of affirmative defenses. A defense rests on something that may or may not happen in the future, namely, whether claims of the complaint are proven. If claims of the complaint cannot be proven, the issue of defense is moot. When a defense rests on something that may or may not happen in the future, it is non-justiciable because it is not ripe. *United Public Workers v. Mitchell* (1947) 330 US 75.

b. The central concern in the ripeness doctrine is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. *Wright, Miller & Cooper* 1992 Pocket Part Section 3532 note 1.5 citing *Lewis v. Continental Bank Corp.* (1990) 110 SCt 1249,1255, 494 US 472, 108 LEd2d 400; *Thomas v. Union Carbide Agricultural Products Co.* (1985) 105 SCt 3325,3333, 473 US 568,580, 87 LEd2d 409.

c. In earlier Cases 1-4 and in the instant cases, the courts acted in the clear absence of Article III Sec. 2.1 Constitutional jurisdiction because their judgements rest on affirmative defenses not on affirmative claims of petitioner's federal rights.

C. Judgements In Earlier Cases And In Instant Case Based On Affirmative Defenses Deprive Petitioner's Rights To Be Heard On Claims Of His Complaints

1. By using procedural rules and affirmative defenses to gain jurisdiction and to defeat petitioner's earlier and instant complaints, the courts have prejudged petitioner's claims in earlier Cases 1-4 and in the instant case. Where a conflict exists between a federal rule and substantive law the latter are unaffected by the rule, i.e., the rule is of no force and effect when rights involve substantive law, and jurisdiction. *Hanna v. Plummer* (1965) 380 US 460, 14 LEd2d 8, 8 SCt 1136; *Sibbach v. Wilson & Co.* (1941) 312 US 1, 85 LEd 479, 61 SCt 422 *reh.den.* 312 US 713, 85 LEd 1144.

2. The court's judgements, based on procedural defenses, do not replace the constitutional requirement that the procedural question must be necessary to resolve a claim put in issue by petitioner's claims. A procedural rule cannot extend federal court jurisdiction beyond the limits of the Constitution. *Hodgson v. Bowerbank* (1809) 9 US 303, 3 LEd 108; for Supreme Court Background see *US LEd Digest*, Courts par. 232.

3. The courts did not give petitioner the opportunity to be heard on his claims in earlier Cases 1-4 and in the instant case, failed to follow the jurisdictional statutes, failed to make trial of claims, and failed to follow the requirements for making final judgements, determinations of claims, and entry of judgements on all claims and parties.

4. The exclusion of petitioner's evidence[10] is inconsistent with substantial justice of petitioner's right to be heard and to offer evidence on claims of the complaint (causes of action). *United States v. Long* (CA3 1978) 574 F2d 761 *cert. den.* 439 US 985, 58 LEd2d 657, 99 SCt 577; *Whitehurst v. Wright* (CA7 1979) 592 F2d 834.

5. Even if a court has jurisdiction, a court which proceeds in such an arbitrary or improper manner that its action may be said to constitute a denial of due process, its judgement is void. *Windsor v. McVeigh* (1876) 93 US 274, 23 LEd 914 (without hearing or opportunity to be heard). *Winhoven v. U.S.* (CA9 1952) 201 F2d 174, 18 FRServ 60b.26, Case 1 (failing to act on motion); *Great American Trading Corp. v. I.C.P. Cocoa, Inc.* (CA7 1980) 629 F2d 1282 (failure to follow a statute requiring evidentiary trial)[11].

6. The inferior courts must be held to a lawful exercise of their prescribed jurisdiction. *Roche v. Evaporated Milk*

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[10] See judgements in earlier and instant cases.

[11] In earlier patent Cases 1,3,4 the courts failed to act on petitioner's motions for evidentiary trial of claims in complaints.

Asso. (1943) 319 US 21, 87 LEd 1185, 63 SCt 938; *U.S. Alkali Export Asso. v. U. S.* (1945) 325 US 196, 89 LEd 1554, 65 SCt 1120; *Banker's Life & Casualty Co. v. Holland* (1953) 346 US 379, 98 LEd 106, 74 SCt 145; *Will v. United States* (1967) 389 US 90, 19 LEd2d 305, 88 SCt 269. See also *Schlagenhauf v. Holder* 379 US 104, 13 LEd2d 152, 85 SCt 234; *Gulfstream Aerospace Corp. v. Macayamas Corp.* (1988 US) 99 LEd2d 296, 108 SCt 1133.

D. Petitioner's Challenge To The Court Of Appeal's Jurisdiction And The Public Interest In Holding Courts To Their Prescribed Jurisdiction Render Judgements Voidable In The Instant And Earlier Cases

In the courts below, petitioner made a number of objections including objection to subject matter jurisdiction in the instant case[12]. If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. The district court's and the appeal court's decisions were made without an inquiry into the question of subject matter jurisdiction raised by petitioner. In effect, the appeal court's decision says that a pre-trial disposition of a case under a federal rule issue of defense confers ju-

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[12] Because this is a direct appeal, the grounds that may be asserted as error are not limited to lack of jurisdiction and fraud. *Martin v. Wilks* 109 SCt 2180,2190 footnote 6.

risdiction and, therefore, there is no need to inquire into the question of subject matter jurisdiction.

Further, a party may collaterally attack an earlier judgement on grounds of lack of jurisdiction and fraud. *Martin v. Wilks* 109 SCt 2180,2189 (1989). In the complaint, petitioner made a number of objections including objection to subject matter jurisdiction in earlier Cases 1-4. See page 5 and footnote 4 *supra*. The court of appeal's opinion that the earlier cases are res judicata overlooks the public interest. Preclusion should apply unless the petitioner should be afforded the opportunity to reopen the controversy. See *Restatement (Second) of Judgements* 12 Comment d. Assuming that the conditions are met, relief from the earlier judgements ought to be granted under almost all circumstances. See *Restatement (Second) of Judgements* 69 Comment c. Thus, judgements in earlier cases may be subsequently attacked for lack of jurisdiction of subject matter if it appears that

(1) The subject matters of earlier cases were so plainly beyond the court's jurisdiction that their entertaining actions were manifest abuses of authority; or

(2) Allowing the earlier judgements to stand would substantially infringe the authority of other tribunals. See Restatement (Second) of Judgements 69 Comment a.

The judgements in earlier cases were based on affirmative defenses of patent invalidity (earlier Cases 1,3,4) and collateral estoppel (earlier Case 2). See footnote 1, *supra*. For the reasons in Parts A-C *supra*, the court's decisions based on af-

firmative defenses of patent invalidity and collateral estoppel were plainly beyond the court's jurisdiction under 28 USC 1338 in earlier Cases 1,3,4 and 28 USC 1331,1334 in earlier Case 2 and thus decisions were manifest abuses of authority made in the clear absence of all jurisdiction over the subject matter. Allowing the earlier judgements to stand as precedents would substantially infringe the authority of other courts to decide cases in similar circumstances and would seriously impair the public interest for adjudicating cases based on claims of complaints, if the practice of deciding cases on affirmative defenses is allowed to continue. Suits arise under the laws that create causes of action not from defenses to claims. *Christianson, supra.*

E. Sanctions Based On Defense Issues In Papers Not Signed By Petitioner Overlook The Facts And The Law

1. Federal Rule of Civil Proceure 11 provides for sanctions against a party who signs and files a pleading without reasonable inquiry grounded in facts and warranted by law or a good faith argument for the extension, modification, or reversal of existing law. Since there has been no adjudication on the merits of claims in the petitioner's complaints, the court's decisions that sanctions are warranted are based on affirmative defenses, in pleadings signed and filed by respondents. Under Rule 11, sanctions cannot be based on pleadings not signed and filed by petitioner. *Zaldivar v. Los Angeles* (CA9 1986) 780 F2d 823 (whether the document at issue was well grounded in fact); *Wiley v. Coastal Corp. et. als.* (1992) 112 SCt 1076 (con-

duct of party with respect to court filings).

2. On the question whether Rule 11 sanctions can be considered on issues of defenses, some courts require counsel to cite all opposing authority. *Jorgenson v. Colusia County* (CA11 1988) 846 F2d 1350. Not all courts require total disclosure. In *Golden Eagle Distributing Corp. v. Burroughs Corp.* (CA9 1986) 801 F2d 1531 the court found that although the paper in question was factually and legally supportable, it failed to notify the court of the existence of adverse authority. In the instant case, the courts failed to determine whether claims of the complaint were factually and legally supportable where the complaint itself notified the courts that objections were being made against adverse decisions in earlier cases.

3. On the question whether Rule 11 sanctions can be considered only if the jurisdictional requirements have been met[13], the various circuits are not in agreement. *Orange Production Credit Ass'n v. Frontline Ventures, Ltd* (CA9 1986) 792 F2d 797 (lack of subject matter jurisdiction does not bar sanctions under Rule 11); *Chick Kam Choo v. Exxon Corp.* (CA5 1985) 764 F2d 1184 (jurisdiction wanting); *Johnson Chemical Co., Inc. v. Home Care Products, Inc. (CA2 1987) 823 F2d 28,30 (dismissal by notice deprives court of jurisdiction).* However, *Orange Production* is wrong because Rule 11 "shall not be construed to extend or limit the jurisdiction of the U.S. Dis-

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[13] Here whether the courts have jurisdiction of the subject matter under 28 USC 1334 and 28 USC 157(2)(B) and (C) and, if so, whether the courts have post-judgement jurisdiction for Rule 11 sanctions.

trict Courts". FRCP 82; *Hanna, Sibbach, Hodgson, U.S. LEd Digest* par 232,243 et seq., *supra.*

F. Petitioner's United States Patents Are Not Subject To Assignment To The U.S. Marshall By Operation Of California State Law

1. *Re Peregrine* 116 BR 194,205 footnote 16 held that "while it appears that in California a judicial lien may, in fact, be used to encumber a copyright [or patent], that is only half the task; the court must also determine whether federal law insulates copyrights [or patents] from attachment by state court procedures"[14]. As to patents, state law is limited to determining the relative rights of creditors and patent exemptions. *Re Transportation Design* (BC SD Cal. 1985) 48 BR 635,639-40.

2. State law may not nullify the patent laws of Congress regulating their transfer. *Allen v. Riley* (1906) 203 US 347. Federal regulation under 35 USC 261 preempts state law. *Re Peregrine* 116 BR 194,206 footnote 17. Where federal law excludes state law, the court must apply the federal law. *Re Velikoplejki* (BC SD Fla 1985) 54 BR 534,538; *Re Transpor-*

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[14] Judgement lien creditors are not purchasers or mortgagees under 35 USC 261. *Re Peregrine* 116 BR 194,206 footnote 17. A judgement lien creditor is not a bona fide purchaser. *Re Mellor* (CA9 1984) 734 F2d 1396,1941. Nor is creditor's judgement a lien under 28 USC 1962 because patents have no situs for jurisdictional purposes. "Intellectual property, such as patents, is the most intangible form of property", *Filmtec Corp. v. Allied Signal, Inc.* (CAFC 1991) 939 F2d 1568, 1570 n.5, "with no situs for jurisdictional purposes", see *4 Wright & Miller, Federal Practice and Procedure* 1071, at 429-30 (1987) (rule that jurisdiction can be based on location of property "obviously has no relevance when the debt or obligation is not embodied in a writing at all, as is true of patents").

tation Design (BC SD Cal 1985) 48 BR 635,639-40; *Unarco Industries, Inc. v. Kelley Co.* (CA7 1972) 465 F2d 1302,1305-06.

3. 35 USC 261 governs the assignment, and voidance of assignment of patents. Questions of patent assignments arise under the patent laws. *Crown Die & Tool Co. v. Nye Tool & Machine Works* (1923) 261 US 24, 67 LEd 516, 43 SCt 254; SCt background *US LEd Digest* Courts 291; *Geni- Chlor Int'l, Inc. v. Multisonics Dev. Corp.* (CA9 1978) 580 F2d 981, 200 USPQ 67.

4. In *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194 the court was faced with the same issue which is now before this Court, i.e., should a creditor have the status of a bona fide purchaser, rather than that of a judicial lien creditor. Creditor Cap Fed argued that the term transfer in section 205(d) of the Copyright Act refers only to consensual transfers. The court rejected this argument

> "The Copyright Act's definition of transfer is very broad and specifically includes transfers by operation of law. 17 USC 201(d)(1). The term is broad enough to encompass not merely purchasers but lien creditors as well." *Id* 206. However, in footnote 17, the court distinguished the Patent Act "Unlike 17 USC 205(d), the priority scheme created under the Patent Act specifically applies only to subsequent purchasers and mort-

gagees. 35 USC 261. Lien creditors are neither."
Id 206 footnote 17.

The court held that Cap Feds earlier prepetition unperfected security interest in NPI's copyrights is trumped by NPI's hypothetical judicial lien. *Id* 207.

5. Petitioner's ownership of patents trumps the creditor's unsecured and unperfectable claim. Creditors are not secured creditors that could have perfected their security interests by filing in the Patent Office. Unsecured, unperfected interests have no claim to title under 35 USC 261. *Id* 206 footnote 17. Under 35 USC 261 the creditor must have the status of a bona fide purchaser, rather than that of unsecured creditor since 35 USC 261 refers only to consensual transfers. Creditors are neither purchasers or mortgagees under 35 USC 261. Indeed, creditors are not even lienholders because their judgement lien does not apply to patents.

G. Conflicts Of Decisions

(a) Dismissal Of The Complaint

1. The court of appeals cites *Robi v. Five Platters, Inc.* (CA9 1988) 838 F2d 318,321 for the proposition, by implication, that the affirmative defense of res judicata is a claim for purposes of Rule 54(b) in the instant case[15]. This is contrary to the decisions of this Court and other Circuits. See citations in

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[15] The court of appeals cites earlier Case 1 for the propositions, by implication, that the affirmative defense of patent invalidity is a claim for purposes of Rule 54(b), jurisdiction under 28 USC 1338(a), and the 5th

Part A *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decisions in *Sears Roebuck, supra* and *Curtis Wright, supra* that "judgements must be determined on the merits of a cause of action", **second**, to explicitly rule that affirmative defenses of patent validity and res judicata are not claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b) and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Fourth and Seventh Circuits in this matter in *Flynn, supra, Smith, supra.*

2. The court of appeals cites *Robi v. Five Platters, Inc.* (CA9 1988) 838 F2d 318,321 for the proposition, by implication, that the affirmative defense of res judicata is a claim for purposes of jurisdiction under 28 USC 1334 and 28 USC 157(b) (2)(B) and (C) in the instant case[16]. This is contrary to the decisions of this Court and other Circuits. See citations in Part B *supra*. This Court should grant certiorari here, **first**, to resolve the conflict created by the court of appeal's decision and this Court's decision in *Christianson, supra* that affirmative defenses are not claims for purposes of jurisdiction under 28 USC 1338, 1331,1343; this Court's decision in *Louisville &*

Amendment right to be heard on claims of a complaint. It also cites earlier Case 2 for the propositions, by implication, that the affirmative defenses of collateral estoppel and judicial immunity are claims for purposes of Rule 54(b), jurisdiction under 28 USC 1331 and 1343, and the 5th Amendment right to be heard on claims of a complaint.

16 See footnote 15.

Nashville RR Co., supra that "federal subject matter jurisdiction may not rest on defenses but must instead rest on affirmative claims of federal rights"; and this Court's decision in *United Public Works, supra* that "a defense which rests on something that may or may not happen in the future is not ripe", **second**, to explicitly rule that affirmative defenses of patent invalidity and res judicata are not claims for purposes of jurisdiction under 28 USC 1338,1331,1343,1334 and 28 USC 157(b)(2) (B) and (C) and under Article III Section 2.1 of the Constitution and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Third and Federal Circuits in the matter in *Thiokol Chemical, supra* and *Simmons Fastener, supra*.

3. The court of appeals cites *Robi v. Five Platters, Inc.* (CA9 1988) 838 F2d 318,321 for the proposition, by implication, that the affirmative defense of res judicata does not deprive petitioner's right to be heard on his claims in the instant case[17]. This is contrary to the decisions of this Court and other Circuits. See citations in Part C *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decisions in *Hanna, supra* and *Sibbach, supra* that "Where a conflict exists between a federal rule and substantive law the latter is unaffected by the rule, i.e., the rule is of no force and effect when rights involve substantive law, and jurisdiction"; this Court's

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[17] See footnote 15.

decision in *Hodgson, supra* that "A procedural rule cannot extend federal court jurisdiction beyond the limits of the Constitution"; this Court's decision in *Windsor, supra* that a judgement is void when a court denies a hearing or opportunity to be heard; and this Court's decisions in *Roche, supra, U.S. Alkali, supra, Banker's Life, supra, Will, supra, Schlagenhauf, supra*, and *Gulfstream, supra* that the inferior courts must be held to a lawful exercise of their prescribed jurisdiction, **second**, to explicitly rule that affirmative defenses of patent validity and res judicata which deprive the right to be heard on claims of complaints offend due process and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Third and Seventh Circuits in *United States v. Long, supra*, and *Whitehurst, supra* that the exclusion of evidence is inconsistent with substantial justice to be heard and to offer evidence on claims of the complaint (causes of action).

4. The court of appeals cites *Robi v. Five Platters, Inc.* (CA9 1988) 838 F2d 318,321 for the proposition, by implication, that its decision does not require inquiry into the question of subject matter jurisdiction raised by petitioner in the instant case. This is contrary to the decisions of this Court and other Circuits. See numerous decisions in *Wright, Miller, Cooper Federal Practice and Procedure*, Jurisdiction 2d 3536 footnote 2. This Court should grant certiorari here to resolve the conflicts created by the court of appeal's decision and the numerous decisions in *Wright, Miller, Cooper Federal Practice and Procedure, Jurisdiction 2d* 3536 footnote 2.

5. The court of appeals cites *Robi v. Five Platters, Inc.* (CA9 1988) 838 F2d 318,321 for the proposition, by implication, that a party may not collaterally attack an earlier judgement on grounds of lack of jurisdiction. This is contrary to the decisions of this Court and other Circuits. See citations in Part D *supra*. This Court should grant certiorari here to resolve the conflicts created by the court of appeal's decision and this Court's decisions in *Martin, supra* that parties may collaterally attack judgements on grounds of lack of jurisdiction and fraud; and this Court's decisions and decisions of other Circuits in *Restatement (Second) of Judgements* 12 Comment d that judgements in earlier cases may be attacked for lack of jurisdiction when it appears that the earlier judgements were manifest abuses of authority or have seriously impaired the public interest or have infringed constitutional protections, here the right to be heard on claims of a complaint.

(b) Sanctions

The court of appeals cites *Townsend v. Holman Consulting Corp.* (CA9 1990) 929 F2d 1358 (en banc) and *Orange Production, supra* for the propositions, first, that defense issues in papers signed and filed by respondents, not signed and filed by the petitioner, warrant sanctions and, second, that sanctions can be made when the jurisdictional and statutory requirements are not met. This is contrary to the decisions of this Court and other Circuits. See citations in Part E *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decision in

Wiley, supra that the alleged conduct must relate to court filings by a party, **second**, to explicitly rule that sanctions cannot be based on issues of defense in papers not signed by a party but must be based solely on contents of the document at issue[18]; and that sanctions cannot be made if the jurisdictional requirements are not met and, **third**, to resolve the conflicts created by the Ninth Circuit's decisions and the decisions in the Second and Fifth Circuits in *Chick Kam Choo, supra* and *Johnson, supra* that jurisdiction is necessary.

(c) Execution On Patents

The court of appeals cites *Pacific Bank v. Robinson* 57 Cal. 520,524 (1981); *Peterson v. Sheriff of San Fransisco* 115 Cal. 211,213 (1896); *Zanetti v. Zanetti* 77 Cal. App. 2d 553,559 for the propositions, first, that judgement lien creditors are bona fide purchasers under 35 USC 261 and lienholders under 28 USC 1962, and that California state law can be used to execute against United States Patents. This is contrary to decisions of this Court and other Circuits. See citations in Part F *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decision in *Allen v. Riley, supra* that "State law may not nullify the patent laws of Congress regulating their transfer"; this Court's decision in *Crown Die & Tool, supra*, that "Questions of patent assignments arise under the patent laws"[19];

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[18] The Ninth Circuit itself agrees. See *Zaldivar, supra* (whether the document at issue was well grounded in fact).

[19] The Ninth Circuit itself agrees. See *Geni-Chlor, supra.*

and in this Court's decisions in *US LEd Digest* Courts 291, **second**, to explicitly rule, first, that federal law insulates patents from attachment by state court procedures[20]; that judgement lien creditors are not purchasers or mortgagees under 35 USC 261; that a creditor's judgement is not a lien against patents under 28 USC 1962; and that courts lack jurisdiction to assign United States Patents by operation of California state laws and, **third**, to resolve the conflicts created by the Ninth Circuit's decisions and the decision in the Federal Circuit in *Filmtec, supra* and in *Federal Practice and Procedure* 1071 at 429-30 (1987) that patents have no situs for jurisdictional purposes; and in the Seventh Circuit decision in *Unarco Industries, supra* that where federal law excludes state law, the court must apply the federal law.

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[20] The Ninth Circuit's decision conflicts with decisions in its own Circuit. See *Re Peregrine, supra* 205 footnote 16, 206 footnote 17; *Re Transportation Design, supra* at 639-640.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Memorandum opinion of the Court of Appeals in this matter[21].

Dated: 11 March, 1994

Respectfully submitted

James Constant
Pro Per Petitioner

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21 If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions and opinions in the Third, Fourth, Fifth, Seventh and Federal Circuits cited in Parts A through F, *supra*.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT,	)	Nos. 92-55465
	)	92-56220
Debtor,	)	92-56475
	)	
	)	D.C. No.
JAMES CONSTANT,	)	CV-91-5456-R
	)	
v.	)	
	)	
ADVANCED MICRO-DEVICES,	)	
INC., et al.	)	MEMORANDUM*
	)	
Defendants - Appellees.	)	
	)	

Appeal from the United States District Court for the Central District of California Manuel L. Real, District Judge, Presiding

Submitted November 17, 1993**

Before: SCHROEDER, D.W. NELSON, and THOMPSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir, R, 36-6.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

James Constant appeals pro se the district court's orders (1) dismissing Constant's complaint, (2) enjoining Constant from filing further papers without prior court approval, (3) imposing Rule 11 sanctions against Constant, and (4) assigning Constant's patents and copyrights to the U,S, marshal to satisfy the court's judgment against Constant, We have jurisdiction pursuant to 28 U.S.C. 1291. We affirm and impose sanctions against Constant for filing a frivolous appeal.

The history of Constant's litigation, which began in 1985 with patent infringment actions, is summarized in previous decisions of the Federal Circuit, and we do not repeat it here. See *Constant v. United States*, 919 F.ld 654, 656 (Fed. Cir.), *cert. denied*, 111 S. Ct. 2799 (1991); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 488 U.S. 892 (1988). After Constant's numerous district court actions were decided adversely to him, and faced with numerous sanctions awards imposed by various U.S. district and appellate courts for his frivolous litigation, Constant filed for bankruptcy.

Constant filed the instant action in bankruptcy court as an adversary proceeding objecting to creditors' claims. On defendants' motion, the district court withdrew the reference of Constant's complaint to the bankruptcy court. The complaint was transferred to district court and assigned to Judge Real. Constant then moved to recuse Judge Real. The district court denied the recusal motion and dismissed Constant's complaint on grounds of res judicata and collateral estoppel. The district

court also enjoined Constant from filing any future papers containing claims or allegations against these defendants without first obtaining court approval.

After the district court entered judgment, defendants requested the imposition of Rule 11 sanctions against Constant for filing this action. The district court awarded defendants $28,921.72 in attorneys' fees under Rule 11. The court then, on motion by defendants, assigned Constant's patents and copyrights to the U.S. marshal to satisfy the court's judgment.

Constant filed timely notices of appeal from all three district court final orders. In appeal No. 92-55465, from the underlying judgment, Constant contends that the district court erred by (1) withdrawing the reference to bankruptcy court, (2) denying Constant's recusal motion, (3) dismissing the action, and (4) entering the injunction. In appeal No. 92-56220, Constant appeals the imposition of Rule 11 sanctions. In appeal No. 92-56475, Constant appeals the district court's assignment of his patents and copyrights to the U.S. marshal to satisfy the judgement.

I. NO. 92-55465

A. WITHDRAWAL OF REFERENCE

We review for abuse of discretion the district court's order granting defendants' motion to withdraw the reference to bankruptcy court. *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1451 (9th Cir. 1990). A

district court may withdraw, in whole or in part, any case or proceeding referred to bankruptcy court, on its own motion or on timely motion by any party, for cause shown. 28 U.S.C. 157(d). The factors to be considered in determining whether to withdraw the reference include whether the proceeding is a core proceeding, judicial economy, convenience, and expertise of the court. *United States v. Star Route Box 1328*, 137 B.R. 802, 806 (Bankr. D. Or. 1992).

Here, Constant's complaint alleged that the judgments against him which were the basis of his creditors' claims were procured by fraud and conspiracy. Constant's complaint thus constituted another collateral attack on the judgments in favor of defendants obtained in the earlier litigation. Further, because Judge Real had presided over previous, virtually identical actions brought by Constant, Judge Real was familiar with the facts and claims raised by the complaint. Under these circumstances, the district court did not abuse its discretion by withdrawing the reference. *See In re Cinematronics, Inc.*, 916 F.2d at 1451; *Star Route Box 1328*, 137 B.R. at 806.

B. RECUSAL MOTION

We review the denial of a recusal motion for abuse of discretion. *Sewer Alert Comm. v. Pierce County*, 791 F.2d 796, 798 (9th Cir. 1986). A motion for recusal of a judge pursuant to 28 U.S.C. 144 will be granted only upon a showing of bias or prejudice from an extrajudicial source. *Toth v. Trans World Airlines, Inc.*, 861 F.2d 1381, 1388 (9th Cir. 1988). A motion for recusal which does not point to an extrajudicial source of

bias is legally insufficient. *Id.*

Here we find no abuse of discretion in the district court's denial of the recusal motion because Constant failed to show any extrajudicial source of bias. *See id.* Judge Real's adverse rulings in previous litigation do not demonstrate personal bias against Constant. *See United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979). Further, the fact that Constant filed a lawsuit against Judge Real based on Judge Real's decisions in other, related litigation does not require recusal. *See Ronwin v. State Bar of Arizona*, 686 F.2d 692, 701 (9th Cir. 1981), *cert. denied*, 461 U.S. 938 (1983) and *rev'd on other grounds*, 466 U.S. 558 (1984).

C. DISMISSAL OF COMPLAINT

We review de novo the district court's determination that an action is barred by the doctrine of res judicata. *Robi v. Five Platters Inc.*, 838 F.2d 318, 321 (9th Cir. 1988).

The doctrine of res judicata encompasses the doctrines of issue preclusion and claim preclusion. *Id.* "Claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded be- tween the same parties on the same claim or cause of action." *Id.* (quotation omitted). Claim preclusion bars relitigation of all claims that were previously available to the parties, whether or not the claims were actually asserted and adjudicated in the prior action. *Id.* at 322.

Here, Constant's complaint alleged that judgements obtained against him in previous actions were void because they were

rendered by courts lacking jurisdiction and were procured by fraud and conspiracy. Constant's claims regarding his patents had already been litigated and determined on the merits. *see, Constant v. Advanced Micro-Devices*, 848 F.2d 1560, and Constant had already brought one action challenging those judgements on grounds of fraud, *see Constant v. Wilson*, Nos. 88-1195 to 88-1198 unpublished memorandum decision (Fed. Cir. Aug 25, 1988). Thus, the district court properly dismissed Constant's complaint on the ground that his claims were nothing more than collateral attacks on the previous judgments and as such were barred by the doctrine of res judicata. *See Robi*, 838 F.2d at 321-22.

D. PRE-FILING ORDER

We review the district court's order enjoining the filing of meritless claims for abuse of discretion. *Moy v. United States*, 906 F.2d 467, 469 (9th Cir. 1990). An injunction restricting access to the courts is an extraordinary remedy which should be narrowly tailored and rarely used. *Id* at 470. We have outlined specific requirements which district courts must follow before issuing a pre-filing order. *De Long v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir.), *cert. denied*, 498 U.S. 1001 (1990). Specifically, (1) the plaintiff must be given notice and the opportunity to oppose the order, (2) there must be an adequate record for review, (3) the court must make substantive findings of frivolousness, and (4) the order must be narrowly tailored to curb the abuses of this particular litigant. *Id.*

The record demonstrates that all the De Lonq requirements

were met in this case. Constant was given notice of the defendants' motion for injunction, filed extensive opposition papers, and appeared at the hearing on the motion for injunction. The court made specific findings of frivolousness, and these fndings are fully supported by the record in this case and by Constant's history of litigiousness. The injunction was sufficiently narrow in that it limited Constant from filing further papers against these defendants regarding his patent claims, but did not prohibit Constant from access to the courts in unrelated matters. Under these circumstances, we conclude that the injunction was appropriate to stop Constant's meritless litigation. See *id.*

II. NO. 92-56220

We review the imposition of Rule 11 sanctions for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-01 (1990). Rule 11 sanctions are proper if either a) the pleading is filed for an improper purpose, or b) the pleading is frivolous. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). A pleading is frivolous if it is both baseless and made without a reasonable and competent inquiry. *Id.*

Here, Constant's claims were clearly barred by res judicata and therefore his complaint was frivolous. Further, this complaint does not represent an isolated instance of a frivolous action filed by a pro se litigant but rather is a continuation of

Constant's relentless campaign of frivo- lous litigation against these defendants. Moreover, Constant has been repeatedly warned by various courts that persistence with this meritless litigation will result in sanctions and has already been sanctioned numerous times. Under these circumstances, the district court did not abuse its discretion by imposing Rule 11 sanctions and awarding defendants attorneys' fees. See *Id.*

III. NO. 92-56475[1]

A district court has authority to enforce its money judgment in accordance with the practice and procedure of the state in which it sits. Fed. R. Civ. P. 69(a); *Duchek v. Jacobi*, 646 F.2d 415, 416 (9th Cir. 1981). Under California law, all property of the judgment debtor is subject to enforcement of a money judgment including intangible property such as patents and copyrights. Cal. Civ. Proc. Code 695.010; *Pacific Bank v. Robinson*, 57 Cal. 520, 524 (1881). The proper procedure to execute on a patent is to obtain an order of the court directing the patent holder to assign the patent. *Peterson v. Sheriff of San Francisco*, 115 Cal. 211, 113 (1896). The assignment need not be executed personally by the patentee; the court may authorize a court officer to execute the assignment and the assignment will be binding on the patentee. *Id.; Zanetti v. Zanetti*, 77 Cal. App, 2d 553, 559 (1947).

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[1] Constant's motion for reconsideration of this court's order granting defendants' late motion for leave to join in the answering brief is denied.

Here, defendants moved for an order to enforce the judgement against Constant's patents and copyrights, which represented his only assets. The district court granted the motion and entered an order directing Constant to assign the patents and copy rights to the U.S. marshal. The order further provided that if Constant failed to do so within seven days, the U.S. marshal was directed to execute an assignment which would have the same binding effect as if executed by Constant. The order was within the district court's authority to enforce its judgement. *see Duchek*, 646 F.2d at 416; *Pacific Bank*, 57 Cal. at 524, and was carried out in compliance with the applicable state procedure and practice, see *Peterson*, 115 Cal. at 213; *Zanetti*, 77 Cal. App. 2d at 559. We have considered Constant's numerous arguments on appeal and find them to be without merit. Accordingly, we affirm the district court's order assigning Constant's patents and copyrights to the U.S. marshal to satisfy the court's judgment.

IV. SANCTIONS ON APPEAL

In all three appeals, defendants request sanctions against Constant. This court has discretion to impose damages against litigants, even pro se, as a sanction for bringing a frivolous appeal. Fed. R. App. P. 38, 28 U.S.C. 1912; *Wilcox v. Commissioner*, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). An appeal is frivolous if the results are obvious or the

arguments of error are wholly without merit. *Wilcox*, 848 F.2d at 1009. Constant's claims are wholly without merit, and his appeals are especially frivolous in light of his long history of repeatedly litigating the same claims despite repeated warnings by various trial and appellate courts that he would be sanctioned for persisting with his activities. *See Id.* Nevertheless, in the exercise of our discre- tion we decline to award sanctions in favor of defendants.

AFFIRMED.

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT,	)	No. CV 91 5456 R
	)	
Plaintiff,	)	(BKTCY. CASE NO.
	)	19270 KL Converted
v.	)	to Chapter 7.
	)	ADV CASE NO. 91-
ADVANCED MICRO-DEVICES,	)	00623, ref. to
INC., et.al	)	District Court
	)	
Defendants.	)	ORDER DISMISSING
	)	COMPLAINT
	)	
	)	Date: Feb.18,1992
	)	Time: 10:00 a.m.
	)	Courtroom of the
	)	Honorable Manuel
_____	)	L. Real

WHEREAS, the motion made by defendants Fujitsu Limited, Fujitsu Microelectronics, Inc., Morrison & Foerster, and Limbach & Limbach (collectively, the "Fujitsu Defendants") to dismiss the "Complaint: Debtor's Objections to Creditor's Claims Based On Void Judgements Obtained Through Fraud; Demand for Relief; Jury Demand" ("Complaint") filed by plaintiff James Constant in this matter, came on regularly for hearing before the Honorable Manuel L. Real on February 18, 1992; and

WHEREAS, plaintiff James Constant brought a Motion for Order Staying Hearing on the Fujitsu Defendant's Motion to Dismiss the Complaint; a Motion to Strike the Motion to Dismiss; a Motion for Declaratory Judgement that Federal Statutes 28 USC 1331, and 2072, and Rules 11, 12(b), 41(b), and 56 are Unconstitutional; a Request for Hearing on the Propriety of Taking Judicial Notice of Documents and Tenor of the Matter Noticed; a Motion to Strike Defendant's Applications for Orders of Injunction; and

WHEREAS, the Court has considered all evidence presented and papers filed and all oral and documentary argument, and good cause appearing therefor:

THE COURT HEREBY MAKES THE FOLLOWING ORDERS:

1. Plaintiff's Motion To Strike the Fujitsu Defendant's Motion to Dismiss is DENIED;

2. Plaintiff's Motion for Order Staying Hearing on the Fujitsu Defendant's Motion to Dismiss the Complaint is DENIED;

3. Plaintiff's Motion for Declaratory Judgement that Federal Statutes 28 USC 1331, and 2072 and Rules 11, 12(b), 41(b), and 56 are Unconstitutional is DENIED;

4. Plaintiff's Request for Hearing on the Propriety of Taking Judicial Notice of Documents and Tenor of the Matter Noticed is DENIED;

5. Plaintiff's Motion To Strike Defendant's Applications for Orders of Injunction is DENIED; and

6. The Fujitsu Defendant's Motion To Dismiss is GRANTED, and THE COMPLAINT IS DISMISSED WITH PREJUDICE.

Dated: March 10, 1992

MANUEL L. REAL
Judge of the United
States Court for
the Central District
of California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT,	)	Nos. 92-55465
	)	92-56220
Debtor,	)	92-56475
	)	
	)	D.C. No.
	)	CV-91-5456-R
JAMES CONSTANT,	)	Central
	)	California
v.	)	(Los Angeles)
	)	
ADVANCED MICRO-DEVICES,	)	
INC., et al.	)	ORDER
	)	
Defendants - Appellees.	)	
	)	

Before: SCHROEDER, D.W. NELSON, and THOMPSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RULE 54 Judgement Upon Multiple Claims Or Involving Multiple Parties

(b) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third- party claim, or when multiple parties are involved, the court may direct the entry of a final judgement as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not termi- nate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabili- ties of the parties.

28 USC 1338 Patents

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, ...

28 USC 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 USC 1343 Civil Rights

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b) Procedures

(2) Core proceedings include ...

(B) allowance or disallowance of claims against the estate or exemptions from prop- erty of the estate ...; (C) counterclaims by the estate against persons filing claims against the estate.

Amendment V United States Constitution

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Federal Rule Of Civil Procedure 11

. . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction ...

28 USC 1962 Lien

Every judgement rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgement of a court of general jurisdiction in such State .....

35 USC 261 Ownership; Assignment

..... patents, or any interest therein, shall be assignable in law by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may in like manner grant and convey an exclusive right under his ... patents, ..

An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subse- quent purchase or mortgage.

No. 93-1518

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

RECEIVED
APR 15 1994
OFFICE OF THE CLERK

In Re: JAMES CONSTANT, *Debtor,*
JAMES CONSTANT, *Petitioner,*

v.

ADVANCED MICRO-DEVICES, INC.; KRISTIN M. CANO; KANE, DALSIMER, SULLIVAN, KURUCZ, LEVY, EISELE & RICHARD; AT&T PARADYNE; JONATHAN R. ELLOWITZ; ANTHONY DE ALCUAZ; SKJERVEN, MORRILL, MACPHERSON, FRANKLIN & FRIEL; MORRISON & FOERSTER; LIMBACH & SUTTON; FUJITSU, LTD; FUJITSU MICROELECTRONICS; PAUL MALINGAGIO; SHEPPARD, MULLIN, RICHTER & HAMPTON; BAKER MILLS & GLAST; ACKER, UNDERWOOD & SMITH; FPS, INC; FULLBRIGHT & JAWORSKI; AMERICAN TELEPHONE & TELEGRAPH; SPENSLEY, HORN, JUBAS & LUBITZ; HITACHI AMERICA, INC.; PRETTY, SCHROEDER, BRUEGGEMAN & CLARK; HOPGOODE, CALIMAFDE, KALIL, BLAUSTEIN & JUDLOWE; ANALOG DEVICES, INC.; NEC ELECTRONICS, INC.; BLAKELY, SOKLOFF, TAYLOR & ZAFMAN; BROWN & BAIN; MARCEL HOFF; INTEL CORP.; ROMNEY, GOLANT, MARTEN & ASHEN; AMERICAN MICROSYSTEMS, INC.; GOULD, INC.; TEXAS INSTRUMENTS, INC.; GROSSMAN, GRAVEN, PERRY & BLOCK; DIGITAL SWITCH, INC.; GRANGER ASSOCIATES, INC.; MUNGER, TOLLES & OLSON; ROCKWELL INTERNATIONAL, INC.; TRW, INC.; ARNOLD, WHITE & DURKEE; DAVID L. RAY, Trustee; SALTZBURG, RAY & BERGMAN;
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

Respondents present this statement of the Questions Presented for review because respondents disagree that petitioner James Constant has accurately framed the questions in his Petition for Writ of Certiorari.

1. Whether the Court of Appeals properly affirmed the District Court's dismissal of petitioner's complaint under the doctrine of res judicata where petitioner's complaint sought to raise the same claims and issues previously litigated between the parties and to collaterally attack prior judgments against petitioner.

2. Whether the issuance of sanctions for petitioner's frivolous complaint raises any new or controversial issue of federal law.

3. Whether the routine enforcement of the respondents' sanction judgment against petitioner raises any new or controversial issue of federal law.

RULE 29.1 LISTING

Respondent Fujitsu Limited has no parent company. Fujitsu has the following subsidiaries that are not wholly-owned: Fujitsu Denso, Ltd.; Fujitsu Kiden, Ltd.; Fuji Electrochemical Co., Ltd.; Shinko Electric Industries Co., Fujitsu Business Systems, Ltd., and ICL Corporation. Fujitsu also owns approximately forty-five percent of the shares of Amdahl Corporation.

Respondent Fujitsu Microelectronics, Inc. (FMI) is a wholly-owned subsidiary of Fujitsu Limited. FMI has no subsidiary that is not wholly-owned.

Respondent Advanced Micro Devices, Inc. has no parent company and no subsidiary that is not wholly-owned.

Respondent NEC Electronics, Inc. is a wholly-owned subsidiary of NEC Corporation. The publicly held affiliates of NEC Corporation are: Nippon Electric Glass Co., Ltd.; Japan Aviation Electronics Industry, Limited; Toyo Communication Equipment Co., Ltd.; Nitsuko, Limited; NEC Systems Integration & Construction, Ltd.; Anritsu Corporation; Tokin Corporation; Ando Electric Company, Limited; Nippon Avionics Co., Ltd.; Nippon Electric Industry Co., Ltd.; and Nippon Computer System Co., Ltd.

Respondent Analog Devices, Inc. has no parent company, subsidiary, or affiliate that has issued shares to the public.

Respondent Pretty, Schroeder, Brueggemann & Clark, a professional corporation, has no parent, subsidiary, or affiliate that has issued shares to the public.

Respondent AT&T Paradyne, Inc. is a subsidiary of AT&T. Paradyne has no subsidiary that is not wholly-owned.

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No. 93-1518

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

In Re: JAMES CONSTANT, *Debtor,*
JAMES CONSTANT, *Petitioner,*

v.

ADVANCED MICRO-DEVICES, INC.; KRISTIN M. CANO; KANE, DALSIMER, SULLIVAN, KURUCZ, LEVY, EISELE & RICHARD; AT&T PARADYNE; JONATHAN R. ELLOWITZ; ANTHONY DE ALCUAZ; SKJERVEN, MORRILL, MACPHERSON, FRANKLIN & FRIEL; MORRISON & FOERSTER; LIMBACH & SUTTON; FUJITSU, LTD; FUJITSU MICROELECTRONICS; PAUL MALINGAGIO; SHEPPARD, MULLIN, RICHTER & HAMPTON; BAKER MILLS & GLAST; ACKER, UNDERWOOD & SMITH; FPS, INC; FULLBRIGHT & JAWORSKI; AMERICAN TELEPHONE & TELEGRAPH; SPENSLEY, HORN, JUBAS & LUBITZ; HITACHI AMERICA, INC.; PRETTY, SCHROEDER, BRUEGGEMAN & CLARK; HOPGOODE, CALIMAFDE, KALIL, BLAUSTEIN & JUDLOWE; ANALOG DEVICES, INC.; NEC ELECTRONICS, INC.; BLAKELY, SOKLOFF, TAYLOR & ZAFMAN; BROWN & BAIN; MARCEL HOFF; INTEL CORP.; ROMNEY, GOLANT, MARTEN & ASHEN; AMERICAN MICROSYSTEMS, INC.; GOULD, INC.; TEXAS INSTRUMENTS, INC.; GROSSMAN, GRAVEN, PERRY & BLOCK; DIGITAL SWITCH, INC.; GRANGER ASSOCIATES, INC.; MUNGER, TOLLES & OLSON; ROCKWELL INTERNATIONAL, INC.; TRW, INC.; ARNOLD, WHITE & DURKEE; DAVID L. RAY, Trustee; SALTZBURG, RAY & BERGMAN;
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit from which petitioner seeks certiorari is not reported. A copy of the Opinion is attached as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 3, 1993. (Petition App. A.) A petition for rehearing and a suggestion for hearing en banc were denied by the Court of Appeals on January 10, 1994. (Petition App. C.) The Petition for Writ of Certiorari was filed on March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner James Constant's Statement of the Case provides little description of the long procedural history that precedes his Petition. Because this history is necessary to an understanding of the decisions of the lower courts and to consideration of the questions presented, it is recounted in greater detail below. As this history reveals, petitioner has been adjudged a vexatious and recreational pro se litigant who, despite repeated admonishments and sanctions by numerous federal courts, has persisted in an unending attempt to relitigate a variety of unmeritorious claims against respondents[1] and a long list of other high-technology, judicial, governmental, and law firm defendants. Mr. Constant's

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[1]The respondents joining in this Brief in Opposition to the Petition are: Fujitsu Limited; Fujitsu Microelectronics, Inc.; Morrison & Foerster; Limbach & Limbach; Advanced Micro Devices, Inc.; Skjerven, Morrill, MacPherson, Franklin & Friel; Anthony de Alcuaz; Analog Devices, Inc.; NEC Electronics, Inc.; Pretty, Schroeder, Brueggeman & Clark; Hopgoode, Calimafde, Kalil, Blaustein & Judlowe; AT&T

present petition represents his latest (and respondents hope his last) effort in this attempt.

Petitioner's Earlier Lawsuits

The history of this litigation began in January 1985 when petitioner filed an action in the United States District Court for the Central District of California against the corporate respondents and numerous other high-technology companies. *James Constant v. Advanced Micro-Devices, Inc., et al.*, Case No. 85-0262 SVW (C.D. Cal.) ("Patent Case I"). In that action, petitioner alleged infringement of two of petitioner's patents and also asserted other claims based upon the alleged unconstitutionality of 35 U.S.C. § 282, which authorizes federal courts to adjudicate the validity of patents. The District Court found § 282 to be constitutional and dismissed petitioner's claims unrelated to infringement. Then, in November 1987, the District Court (Judge Stephen V. Wilson presiding), after appointing and receiving recommendations from a special master, granted summary judgment that petitioner's patents at issue in the case were invalid. With this judgment, the District Court also awarded respondents their costs.

Petitioner prosecuted two separate appeals of the District Court's judgment in Patent Case I to the United States Court of Appeals for the Federal Circuit. In each instance, the decisions of the District Court were affirmed. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988); *Constant v. Advanced Micro-Devices, Inc.*, 862 F.2d 320 (Fed. Cir. 1988) (mem.). In its published opinion on the first of these appeals, the Federal Circuit warned petitioner about his already established practice of repeatedly raising previously litigated issues, as follows:

Paradyne; Kane, Dalsimer, Sullivan, Kurucz, Levy, Eisele & Richard; Kristin M. Cano; and Jonathan R. Ellowitz.

> "In the past the appellant has repeatedly attempted to reassert or revive claims and theories after they have been properly dismissed with prejudice by the district court. Appellant is hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided by the district court or by this court, he could be sanctioned under Fed.R.Civ.P. 11, Fed.R.App.P. 38, and the inherent power of the courts to sanction."

Constant, 848 F.2d at 1572.

In response to the Federal Circuit decisions, petitioner filed two petitions for writ of certiorari. Both petitions were denied. *See Constant v. Advanced Micro-Devices, Inc.*, 488 U.S. 892, 109 S. Ct. 228 (1988); *Constant v. Advanced Micro-Devices, Inc.*, 490 U.S. 1007, 109 S. Ct. 1643 (1989).

Dissatisfied with the rulings in Patent Case I invalidating his patents, petitioner filed four new lawsuits in the Central District of California in October and November 1987 naming as defendants, among others, Judge Wilson, the special master appointed by Judge Wilson, and several of the defendants and their attorneys in Patent Case I. *See Constant v. Hillman*, Case No. 87-06592 R; *Constant v. Hoff*, Case No. 87-06766 R; *Constant v. Hitachi America, Ltd.*, Case No. 87-07046 R; *Constant v. Wilson*, Case No. 87-07315 R (collectively, "the Fraud Cases"). In these lawsuits, petitioner sought to collaterally attack the judgment in Patent Case I by claiming that it had been procured through a conspiracy among the defendants, their attorneys, and the federal courts to defraud him. Petitioner also sought to relitigate various issues before the district court in Patent Case I, including whether the proceedings of the patent action violated his right to due process, the constitutionality of 35 U.S.C. § 282, and the constitutionality of summary judgments.

The Fraud Cases came before Chief Judge Manuel Real, who dismissed the complaints against Judge Wilson and the special master on the grounds of judicial immunity and granted summary judgment as to all other defendants on the basis that the Fraud Cases were an improper collateral attack on the rulings in Patent Case I and that petitioner failed to raise any issue of extrinsic fraud. Judge Real also sanctioned petitioner under Rule 11 for filing frivolous lawsuits and awarded defendants their costs and attorneys fees.

Petitioner appealed Judge Real's decisions to the Federal Circuit (Case Nos. 88-1195 to 88-1198), which affirmed the judgments in all respects. *See Constant v. Wilson*, *Constant v. Hillman*, *Constant v. Hitachi America, Ltd.*, *Constant v. Hoff*, 856 F.2d 202 (Fed. Cir. 1988) (mem.). The Federal Circuit also levied its own sanctions against petitioner for filing a frivolous appeal and awarded costs and attorneys fees to defendants, stating in its unpublished opinion:

> "[T]he imposition of Rule 11 sanctions was clearly justified. It is clear from the record that these lawsuits were intended to harass judicial officers and prevailing litigants in the patent suit.
>
> "Many of Constant's attempts to punish the participants in the patent case are rather scurrilous. . . .
>
> "It should have been clear from the opinion of the district court and from the imposition of sanctions that further prosecution of these lawsuits would be unreasonable and frivolous."

Constant v. Wilson, Nos. 88-1195 to 88-1198 unpublished memorandum decision at 17-19 (Fed. Cir. August 25, 1988).

Petitioner subsequently filed a petition for writ of certiorari as to the Fraud Cases. This petition was denied. *See Constant v. Hitachi*, 493 U.S. 936, 110 S. Ct. 330 (1989).

In 1988, petitioner filed another patent infringement case (involving a different patent than those in Patent Case I) against many of the same defendants as in the earlier patent case. *See Constant v. Advanced Micro-Devices, Inc.*, Case No. 88-00784 SVW (C.D. Cal.) ("Patent Case II"). This action was dismissed with prejudice by Judge Wilson for petitioner's continued refusal to comply with a court order to replead his complaint. In dismissing the complaint, Judge Wilson explained "[t]hat the Court is aware that dismissal with prejudice is a severe sanction to impose on a pro se litigant. However .... [h]is pro se status will not shield him from the consequences which any federal litigant must face if he or she insists on pursuing a course of conduct which shows a complete lack of respect for the federal courts." *Constant v. Advanced Micro-Devices, Inc.*, No. 88-00784 SVW unpublished order at 6-7 (C.D Cal. Oct. 31, 1988).

Petitioner appealed the dismissal in Patent Case II to the Court of Appeals for the Federal Circuit, which affirmed the dismissal and again sanctioned petitioner for "filing and maintaining this completely unfounded and vexatious appeal." *Constant v. Advanced Micro-Devices, Inc.*, No. 89-1222 unpublished memorandum decision at 3 (Fed. Cir. April 11, 1989); *see Constant v. Advanced Micro-Devices, Inc.*, 873 F.2d 1451 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for writ of certiorari as to the dismissal was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 814, 110 S. Ct. 62 (1989).

Also in 1988, respondent Advanced Micro Devices, Inc. (AMD) was forced by petitioner's claims in Patent Case II to file an action against petitioner in the Northern District of California for a declaratory judgment that certain other of petitioner's patents were invalid and not infringed by AMD. *See Advanced Micro-Devices, Inc. v. Constant* No. C 88 20101 (N.D. Cal.) (the "DJ Case"). The District Court found on summary judgment that one of petitioner's

patents was invalid and that two others were not infringed. Petitioner appealed this judgment to the Federal Circuit, which affirmed. *See Advanced Micro-Devices, Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for a writ of certiorari was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 1057, 110 S. Ct. 868 (1990)

Yet another action filed by petitioner in 1988, while petitioner's appeal in Patent Case I was pending, was a suit against the United States government in the United States Claims Court asserting that the United States Patent and Trademark Office had somehow breached "patent grant contracts" by issuing him patents that were found to be invalid. *See Constant v. United States*, No. 295-88 (Cl. Ct. 1988) ("PTO Case"). The Claims Court dismissed this action, and petitioner appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. *See Constant v. United States*, 861 F.2d 728 (Fed. Cir. 1988) (mem.), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789 (1989).

Two years later, in August 1990, petitioner filed a motion for relief from the Claims Court's dismissal of his PTO Case. The Claims Court denied petitioner's motion, and petitioner appealed. The Federal Circuit once again affirmed the dismissal and once again sanctioned petitioner for filing a frivolous appeal, concluding that "[g]iven the number of actions he has filed and the frequency and persistence with which he continues to attempt to relitigate the same theories which have consistently and finally been rejected as meritless, the inescapable conclusion is that Mr. Constant 'is engaged in "recreational" litigation . . . .'" *Constant v. United States*, 929 F.2d 654, 659 (Fed. Cir. 1991), *cert. denied*, 111 S. Ct. 2799 (1991). The Court of Appeals further directed the clerk of the court, "[i]n light of Constant's continuous abuse of the appellate process," "to accept for filing no motion, petition, pleading or other

fileable paper from James Constant without an order of the court approving the filing." *Id.*

Petitioner's Present Lawsuit

In September 1989, petitioner filed a voluntary bankruptcy petition under Chapter 11 (later converted to Chapter 7) in the United States Bankruptcy Court for the Central District of California (*In re James Constant*, LA-89-19270 KL). Nearly all of the creditors' claims identified by petitioner in the bankruptcy petition consisted of claims, made by those defendants that petitioner had previously sued, for payment of the costs and sanctions imposed on him by the various district and appellate courts.

In August 1991, in yet another attempt to relitigate his previously rejected claims of patent infringement, fraud, conspiracy, and other causes of action from Patent Cases I and II, the Fraud Cases, and the DJ Case, petitioner filed a complaint in the Bankruptcy Court against the defendants in the prior cases, their attorneys of record, and the bankruptcy trustee. This complaint began the present lawsuit from which petitioner now seeks certiorari. In this complaint, petitioner objected to the defendants' creditor claims on the grounds that they were based on "void judgments obtained through fraud" and rendered without subject matter jurisdiction or due process and sought to set aside all of the prior federal courts' "orders and judgments," to obtain money damages and injunctive relief for the purported injustice done to him in earlier actions, and to disbar the defendant attorneys.

On respondent Fujitsu's motion, petitioner's complaint was withdrawn from the Bankruptcy Court to the District Court and ultimately was transferred to Chief Judge Real, who had heard petitioner's previous Fraud Cases. Thereafter, petitioner filed a lawsuit against Judge Real, among other judges, seeking, in part, money damages and Judge

Real's removal from the bench. Petitioner then used this newest lawsuit as a device to file a motion to recuse Judge Real, accusing the judge of criminality and impartiality. This motion for recusal was denied by the District Court, the Honorable John G. Davies presiding, which found no cause to disqualify Judge Real.

Respondent Fujitsu subsequently moved to dismiss petitioner's complaint with prejudice on the grounds that it was barred under the doctrine of res judicata and to enjoin petitioner from filing any further actions against the defendants without first obtaining the permission of the Court. This motion was granted by Judge Real, and the Court entered its orders of dismissal and injunction on March 12, 1992.

On April 1, 1992, respondent AMD moved the District Court under Federal Rule of Civil Procedure 11 for an award of attorneys' fees and costs as sanctions for filing a frivolous lawsuit. Judge Real granted this motion, finding that "Mr. Constant filed the Complaint only after several unsuccessful attempts to litigate identical issues of fact and law in other courts" and that the claims in the Complaint were "clearly precluded by previous litigation." Judgment on the sanctions award was entered on June 30, 1992.

When petitioner failed to pay AMD the sanctions awarded, AMD requested the District Court to enforce the sanctions judgment against petitioner's various United States patents and copyrights. On October 22, 1992, Judge Real entered an order directing petitioner to assign his patents and copyrights to the United States Marshall for judicial sale and, if petitioner failed to do so, directing the Marshall to execute the assignment on petitioner's behalf.

Petitioner separately appealed to the United States Court of Appeals for the Ninth Circuit from the three district court final orders dismissing his complaint (Appeal No. 92-

55465),[2] awarding Rule 11 sanctions (Appeal No. 92-56220), and assigning his patents and copyright (Appeal No. 92-56475). The Ninth Circuit affirmed the decisions of the District Court in their entirety, holding that petitioner's complaint was barred under the doctrine of res judicata, that the District Court did not abuse its discretion in awarding Rule 11 sanctions, and that the assignment of petitioner's patents and copyrights was proper. *See In re James Constant*, 12 F.3d 1105 (9th Cir. 1993) (mem.); Petition App. A. Although declining to award sanctions against petitioner, the Ninth Circuit also noted in its unpublished memorandum decision that "Constant's claims are wholly without merit, and his appeals are especially frivolous in light of his long history of repeatedly litigating the same claims despite repeated warnings . . . that he would be sanctioned . . . ." Petition App. A 10.

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[2]In Appeal No. 92-55465, in addition to the order of dismissal, petitioner also appealed the district court orders withdrawing the reference of his complaint to the Bankruptcy Court, denying his motion for recusal of Judge Real, and enjoining petitioner from filing further actions against respondents without the permission of the Court. However, in his Petition, petitioner seeks review only of the order of dismissal. *See* Petition 5, n.3. Respondents therefore do not address these additional issues in this Brief in Opposition.

ARGUMENT

I. The Ninth Circuit's Affirmance Of The Dismissal Of Petitioner's Complaint Was Proper And Raises No Important Issue of Federal Law and No Conflict With The Decisions Of Any Other Court.

Although difficult to comprehend, all of petitioner's arguments for certiorari as to the dismissal of petitioner's complaint appear to be premised on the same fundamental misconception — that because petitioner's claims in this case and in his prior cases were disposed of by summary judgment or dismissal based on such defensive assertions as patent invalidity, res judicata, and failure to comply with court orders, petitioner was wrongly denied the opportunity to litigate his claims on their merits. As a result of this denial, petitioner then apparently contends, the orders and judgments of the district courts below and in his prior cases are void and lack preclusive effect because they are not final, because they were rendered by courts lacking subject matter jurisdiction, and because they denied petitioner his right to due process.

All of these arguments, which effectively would require a trial on a plaintiff's causes of action in every instance regardless of the certainty of any affirmative defense, are plainly without merit and are founded on petitioner's misunderstanding of the statutory and case law that he cites. As such, these arguments raise no important issue of federal law, and in correctly rejecting them, the Ninth Circuit did not conflict with any decision of this Court or any decision of any other circuit. Mr. Constant's Petition therefore should be denied.

A. The Judgments In This Case And In The Prior Cases Are Final.

Petitioner's contention that the judgments in this case and in Patent Cases I and II, the Fraud Cases, and the DJ case

are not final derives from Federal Rules of Civil Procedure 58 and 54(b). Rule 58 governs entry of judgments and states that it is "[s]ubject to the provisions of Rule 54(b)." Fed. R. Civ. P. 58. Rule 54(b) permits a court to "direct the entry of a final judgment as to one or more but fewer than all" of the "claims for relief" in an action involving multiple claims or parties when the court determines that there is no just reason to delay entry of such judgment. Fed. R. Civ. P. 54(b). Petitioner thus appears to argue from these rules that entry of the judgments below and in the prior cases pursuant to Rule 58 was improper, and therefore that the judgments are not final, because they were judgments as to "affirmative defenses" rather than petitioner's "claims for relief" as required by Rule 54(b). *See* Petition 8-9.

Petitioner's argument is in error and arises from his apparent misunderstanding of the judgments that have been entered against him. Although varyingly based, in whole or in part, on defenses of patent invalidity or res judicata, or on petitioner's failure to obey court orders, the judgments entered against petitioner were not, as petitioner contends, separate judgments under Rule 54(b) on affirmative defenses. *Cf. Flynn & Emrich Co. v. Greenwood*, 242 F.2d 737, 741 (4th Cir. 1957), *cert. denied*, 353 U.S. 976, 77 S. Ct. 1060 (1957) (judgment on denial of affirmative defense of estoppel under Rule 54(b)); *Smith v. Benedict*, 279 F.2d 211, 213 (7th Cir. 1960) (judgment on denial of affirmative defense of statute of limitations under Rule 54(b)). Rather, these judgments were final determinations on petitioner's claims that denied him any relief and that concluded the litigation in each particular lawsuit. Thus, neither Rule 54(b) nor the case authority cited by petitioner is applicable here, and petitioner's argument must fail. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431, 76 S. Ct. 895 (1956) ("there is no doubt that a judgment striking out all [claims for relief] would be a final and appealable decision").

There can be no question that the judgments below and in the prior cases are final judgments. The Ninth Circuit's rejection of petitioner's contention to the contrary raises no important issue of federal law and no conflict with any other court and therefore cannot serve as a basis for certiorari.

B. The District Courts Below And In The Prior Cases Had Subject Matter Jurisdiction, And The Issue Is Res Judicata.

Petitioner's argument that the district courts below and in the prior cases lacked subject matter jurisdiction is primarily based on his misunderstanding both of the judgments that have been entered against him and of the long established well-pleaded complaint rule for determining federal question jurisdiction discussed in this Court's decision in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166 (1988). In this regard, petitioner appears to contend that because his claims for relief were decided against him on the basis of affirmative defenses and his failure to obey court orders, only "issues of defense," and not his causes of action, were litigated below and in the prior cases. Petitioner therefore reasons that because his causes of action were not litigated, the district courts did not have subject matter jurisdiction because jurisdiction cannot be based on issues of defense. Petition 9-10. This reasoning by petitioner, however, is erroneous, and the record is clear that the district courts below and in the prior cases had subject matter jurisdiction.

Petitioner's complaint below was filed as an objection to creditor's claims and as a counterclaim against creditors in his bankruptcy case. *See* 28 U.S.C. §§ 157(b)(2)(B)-(C). Bankruptcy cases under title 11 of the United States Code are subject to the original jurisdiction of district courts. 28 U.S.C. § 1334. Therefore, the district court below clearly had jurisdiction over petitioner's complaint. This jurisdiction was not, contrary to petitioner's assertions, somehow

divested from the district court by its ruling that petitioner's claims were barred under the doctrine of res judicata. Neither petitioner's reliance on the well-pleaded complaint rule, which provides only that "arising under" jurisdiction requires that a plaintiff's causes of action be based on or necessarily involve questions of federal law and cannot be based merely on anticipation of a federal defense, *see Christianson*, 486 U.S. at 807-10, 108 S. Ct. at 2173-74, nor common sense support such assertions by plaintiff. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, ___, 110 S. Ct. 2447, 2455 (1990) ("The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of . . . the merits of the action . . . .").

Similarly, the prior cases that petitioner attacks (Patent Cases I and II, the Fraud Cases, and the DJ Case) all involved the determination of either the validity and infringement of petitioner's patents or other federal claims made by petitioner, and the district courts in those cases therefore had jurisdiction under either 28 U.S.C. § 1338 or § 1331. Again, the judgments in those cases, as in the case below, could not and did not divest the district courts of that jurisdiction. In any event, the jurisdiction of the district courts in those cases, which either was explicitly challenged by petitioner or could have been raised by him, was res judicata and was not the proper subject of collateral attack in the case below.[3] *See Chicot County Drainage v. Baxter*

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[3]Petitioner's contention that he should be permitted to collaterally attack the subject matter jurisdiction of the district courts in the prior cases in light of the factors described in the *Restatement (Second) of Judgments 2d* § 12, *see* Petition 17-19, is without merit. These factors include (1) that the exercise of jurisdiction was a manifest abuse of authority; (2) that allowing the judgment to stand would substantially infringe the authority of another tribunal; or (3) that the court that exercised jurisdiction was not capable of adequately determining its own jurisdiction. *Restatement (Second) of Judgments 2d* § 12. As the foregoing discussion of petitioner's erroneous theory of the lack of

State Bank, 308 U.S. 371, 376-78, 60 S. Ct. 317 (1940); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321-22 (9th Cir. 1988); *Constant*, 848 F.2d at 1564 (jurisdiction to review the validity of patents challenged in Patent Case I); *Constant v. Wilson*, Nos. 88-1195 to 88-1198 unpublished memorandum decision at 11-12 ("The complaint . . . asks the court to declare the judgment in the patent case to be void because the district court lacked jurisdiction."); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4428, at 280-82 (1981) (hereinafter, *Fed. Prac. & Proc.*); 13A *Fed. Prac. & Proc.* § 3536, at 539.

C. Petitioner's Contention That Respondents' Defenses Were Not Ripe Is Without Merit.

As a secondary basis for asserting lack of jurisdiction of the district courts below and in the prior cases attacked by petitioner, petitioner also appears to contend that affirmative defenses in these cases were not ripe for determination unless and until petitioner's claims were found to be meritorious. Because, according to petitioner, he did not have the opportunity to litigate his causes of action, petitioner therefore argues that the judgments of the district courts at issue were rendered without meeting the Article III requirement of a case or controversy. *See* Petition 14-15.

This unprecedented argument by petitioner clearly misapplies the ripeness doctrine. All of the cases attacked by petitioner involved actual and concrete disputes between the parties that were ripe for determination and that ultimately were resolved against petitioner. *See generally Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 580-581, 105 S. Ct. 3325 (1985); 13A *Fed. Prac. & Proc.* § 3532. Petitioner's contention that his causes of action should have been determined first in these actions without

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jurisdiction in the prior cases indicates, none of these factors could be met in this case.

consideration of any affirmative defense is both unsupportable and unthinkable.

D. Petitioner Was Not Denied Due Process, And The Issue Is Res Judicata.

As a final argument for certiorari as to the dismissal of petitioner's complaint, petitioner appears to contend that he was not permitted to be heard on his claims below and in the prior cases that he attacks because those claims were decided against him on the basis of affirmative defenses and that therefore he was denied due process. *See* Petition 15-17. Like petitioner's other arguments, this contention is erroneous. The case below and the prior cases unquestionably provided petitioner with complete due process and an opportunity to be heard on his claims. *See Constant*, 848 F.2d at 1565 ("federal judicial proceedings, with their extensive notice, opportunity to be heard, and procedural protections, satisfy the constitutional requirement of due process"). Moreover, petitioner repeatedly raised, or could have raised, his claims of denial of due process in the prior cases, and those cases therefore are res judicata and may not be collaterally attacked. *See, e.g., id.*; *Constant v. Wilson*, Nos. 88-1195 to 88-1198 unpublished memorandum decision at 16 (Fed. Cir. Aug. 25, 1988) ("Constant's complaints also explicitly seek to relitigate various issues . . . in [Patent Case I] concerning . . . whether the proceedings of the patent action violated Constant's right to due process."); *see also Robi*, 838 F.2d at 321-22. Thus, the Ninth Circuit rejection of petitioner's argument and affirmance of the dismissal of the complaint raise no new or substantial issue of federal law and no conflict with any other court, and the Petition therefore should be denied.

II. The District Court Properly Sanctioned Mr. Constant According To Well-Established Precedent.

The District Court sanctioned Mr. Constant for filing his frivolous complaint in the present action, which reasserted the same meritless claims rejected in Mr. Constant's previous lawsuits against the defendants. As stated by the Ninth Circuit, Mr. Constant's present lawsuit was a continuation of his "relentless campaign of frivolous litigation against these defendants," notwithstanding prior warnings of the federal courts to Mr. Constant not to persist in bringing these claims. Petition App. A, at 8.

None of Mr. Constant's arguments for certiorari based on the sanctions award has any merit. Federal Rule of Civil Procedure 11 provides for sanctions against a person who signs a frivolous pleading (here, Mr. Constant who himself signed and filed his *pro per* complaint), and the federal courts have consistently recognized the propriety of sanctions against a person who reasserts claims barred by the defense of res judicta. *See, e.g., Paganucci v. City of New York*, 993 F.2d 310, 312 (2d Cir.) (affirming Rule 11 sanctions for filing of frivolous, repetitious claims barred by res judicata which court had previously warned plaintiff not to assert — "No court should have to endure such unreasonable and inappropriate conduct"), *cert. denied*, 114 S. Ct. 90 (1993); *Mir v. Little Co. of Mary Hospital*, 844 F.2d 646, 652 (9th Cir. 1988) (attempt to relitigate matters barred by res judicata constitutes frivolous filing for Rule 11 purposes).

Mr. Constant's argument that the District Court somehow lacked jurisdiction to sanction him for the frivolous complaint, which he himself signed and filed, is baseless. As discussed *supra*, the District Court plainly had jurisdiction to consider and dismiss Mr. Constant's claims. Regardless, as this Court has held in *Willy v. Coastal Corp.*, 112 S. Ct. 1076 (1992), Rule 11 sanctions may be imposed and en-

forced in a case "even when subject-matter jurisdiction is eventually found lacking." *Id.* at 1081 n.5; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, ___, 110 S. Ct. 2447, 2455 (1990) ("The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing.")

The District Court's sanction award against Mr. Constant was proper, and raises no new or controversial question of federal law.

III. The District Court's Enforcement Of Its Sanctions Judgment, Through The Assignment Of Mr. Constant's Patents To The U.S. Marshall For Judicial Sale, Was Supported By Well-Established Precedent.

Likewise lacking in merit is Mr. Constant's argument for certiorari based on the District Court's assignment of his patents to the U.S. Marshall for judicial sale, to enforce the defendants' sanctions judgment against him. Federal Rule of Civil Procedure 69(a) authorizes the district court to enforce its money judgments in accordance with the practice and procedure of the state in which it sits. California law provides that intangible property, such as Mr. Constant's patents, is subject to enforcement of a money judgment. Cal. Civ. Proc. Code § 695.010. California law authorizes the court to direct the patent owner to assign his or her patents to a judicial officer, for judicial sale for the benefit of the patent owner's judgment creditors. *Peterson v. Sheriff of San Francisco*, 115 Cal. 211, 46 P. 1060 (1896). If the patent owner refuses to execute the assignment as ordered, the court may authorize another person appointed by the court (here, the U.S. Marshall) to execute the assignment for purposes of subjecting the patents to judicial sale. *Zanetti v. Zanetti*, 77 Cal.App.2d 553, 559, 175 P.2d 603,

606 (1947). *See also McClaskey v. Harbison-Walker Refractories Co.*, 138 F.2d 493, 499 (3d Cir. 1943) (patent attached by sheriff under writ of *fieri facias*; sheriff's signature on assignment, on behalf of judgment debtor, is sufficient to constitute assignment); Fed. R. Civ. P. 70 (judgment may direct party to execute an assignment of property; if the party fails to do so, the court may direct some other person appointed by the court to execute the assignment on behalf of the party).

Mr. Constant's petition for certiorari ignores these relevant, well-established authorities concerning assignment of patents to enforce a judgment against a patent owner, and instead cites numerous decisions and statutes having nothing to do with the issue. For instance, the bankruptcy court's decision in *In re Peregrine Entertainment, Ltd.*, 116 Bankr. 194 (C.D. Cal. 1990), deals with the competing security interests of creditors in the judgment debtor's copyrights, and has no application to a patent or copyright owner's objection to the judicial assignment of his patents or copyrights to enforce a money judgment against him. Mr. Constant's citation to 28 U.S.C. § 1962, concerning federal courts' judgment liens being handled in the same manner as a judgment of a state court sitting in that state, *cf.* Fed. R. Civ. P. 69(a), likewise provides no support for Mr. Constant's assertion that United States patents are somehow not subject to enforcement of judgment debts.

The only citation by Mr. Constant that has any relevance to the present case is 35 U.S.C. § 261. That statute provides that "patents, or any interest therein, shall be assignable in law by an instrument in writing." The District Court's order, directing the U.S. Marshall's execution of a *written* assignment of Mr. Constant's patents after Mr. Constant refused to do so, is consistent with this statute. The District Court's assignment order, in accordance with the above-cited, well-established precedent authorizing the judicially compelled

assignment of United States patents for judicial sale to enforce a judgment debt, was proper and provides no basis for granting Mr. Constant's Petition.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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